BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH B. ONEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,616
KANSAS TURNPIKE AUTHORITY	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the August 29, 2008, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is an appeal of a preliminary hearing Order in which the Judge awarded claimant medical treatment with Dr. Bernita Berntsen. The Judge specifically found claimant aggravated a hernia.

Respondent contends Judge Avery erred. Respondent argues claimant developed the hernia in question in August 2003 but failed to serve timely written claim upon respondent. In addition, respondent argues claimant did not sustain an injury on May 7, 2008, as alleged, but if he did the injury was not accidental. Respondent summarizes its argument, as follows:

> It is KTA's position that the only evidence of injury to Claimant arose from the August, 2003 event, which was not required to be reported to/filed with the Division. Therefore, the failure of Claimant to pursue his claim provided sufficient foundation for KTA to deny Claimant's request for treatment in January, 2008.
>
> Thereafter, Claimant clearly evidenced an intent to "cause" an "accident" in order to retaliate against his employer for its denial of assistance through the Workers' Compensation system. There is no medical evidence to differentiate between the hernia which Claimant continued to suffer from August, 2003 until January, 2008 and, in fact, through May 7, 2008, by which the Claimant should be entitled to medical treatment as an injury actually suffered on May 7, 2008.
>
> Therefore, KTA respectfully requests the Board to overrule Judge Avery's order for compensation and to find that Claimant has failed to sustain his burden of

> proof that an **accidental injury** occurred on May 7, 2008 in light of the totality of the circumstances which led to this event.[1]

In short, respondent contends claimant is not entitled to receive medical treatment for his hernia under the Workers Compensation Act and, therefore, it requests the Board to reverse the August 29, 2008, Order.

Conversely, claimant contends the evidence proves his present need for surgery resulted from the alleged May 7, 2008, accident that aggravated and worsened a preexisting umbilical hernia. Accordingly, claimant requests the Board to affirm the preliminary hearing Order.

The only issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent on May 7, 2008?

2. If so, did claimant prove that his present need for medical treatment for his abdomen is the result of that accident?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

Claimant works as the head mechanic in respondent's repair shop, which is located in Topeka, Kansas. Claimant has worked for respondent for approximately 16 years. While at work on May 7, 2008, claimant alleges he felt a ripping sensation and severe abdominal pain when he bumped a pickup's trailer hitch with a 95-pound tire that he was carrying. More importantly, claimant alleges that incident aggravated an existing umbilical hernia.

According to claimant, May 2008 was not the first time that he had experienced problems with his abdomen. Instead, claimant learned he had a possible umbilical hernia when he was initially hired by respondent and he underwent a pre-employment physical. Then, as claimant worked for respondent, his abdominal symptoms worsened until August 1998 when he underwent hernia repair surgery. Nevertheless, in August 2003, claimant was struck in the stomach with a torque wrench that had slipped while claimant and his supervisor were tightening a head gasket bolt. The wrench struck claimant in the area where he had undergone the 1998 surgery. Claimant experienced severe pain and believed he had experienced another hernia.

[1] Respondent's Brief at 3, 4 (filed Sept. 25, 2008).

After the 2003 accident, claimant did not seek medical treatment and continued working for respondent. Because he had reported the incident to his supervisor, claimant believed he had an unlimited amount of time to seek treatment. And when the bulge in claimant's abdomen had grown to the extent it was bothering him, claimant decided it was time to address the problem. But in January 2008 when claimant requested medical treatment from respondent under workers compensation, respondent denied it for lack of timely claim. Claimant reacted angrily and told co-workers "I guess I'll just have to have another accident."[2]

Claimant testified he has insurance coverage through his personal health insurance carrier and through the Veterans Administration as he is a former Army Ranger. But despite respondent's denial to provide medical treatment under workers compensation, claimant has not pursued treatment from those other sources.

Despite his ongoing symptoms, claimant continued working for respondent after January 2008 and allegedly injured his abdomen on May 7, 2008, as described above. Claimant testified the May 2008 tire incident caused his abdominal protrusion to increase to approximately three times the size it was in January 2008 (when he requested medical treatment from respondent) and also caused his abdominal pain to increase two to three times.

Following the incident, claimant immediately sought medical treatment at an emergency room. The emergency room referred claimant to Dr. Bernita Berntsen. The history claimant gave Dr. Berntsen in May 2008 indicated he experienced severe abdominal pain when a trailer hitch caught a tire he was carrying and "ripped it around in [his] hands."[3]

Claimant's description of the May 7, 2008, incident is not contradicted. Indeed, a statement introduced by respondent at the preliminary hearing from a co-worker, Russell Siegrist, supports claimant's testimony. That statement reads:

> I watched Keith [claimant] pick up a tire off the front of the truck and start to carry it towards the rear of the truck. I turned around and was walking towards my tool box when I heard the trailer hitch make a noise like it had been hit. I heard Keith make a noise. When I came back to the truck he was complaining about his stomach and holding it. I did not see him hit the hitch but it[']s obvious what happened since the noise I heard.[4]

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[2] P.H. Trans., Resp. Ex. D.

[3] *Id.*, Cl. Ex. 1.

[4] *Id.*, Resp. Ex. A.

> I did hear Keith say that he might have to have another accident when he was denied workmens comp. the first time. I also want to make it clear that it was said while being upset. I know for a fact that people say things that they don't mean when they are upset. I also can say that Keith would never intentionally hurt or harm himself in order to recieve *[sic]* money or to get back at the company.[5]

Claimant specifically denies the May 2008 incident was intentional. And at this juncture there is nothing in the record to cause the undersigned to doubt claimant's testimony that his abdominal protrusion and pain significantly increased following the May 2008 tire incident. Accordingly, the undersigned finds that claimant sustained an accident at work on May 7, 2008, as alleged.

After examining claimant on May 14, 2008, Dr. Berntsen determined claimant had an incisional hernia around his umbilicus approximately 2-3 cm. in size. The doctor recommended laparoscopic repair with mesh. In a letter dated June 5, 2008, the doctor wrote, in part:

> Mr. Oney is a 55-year-old male who I saw on May 14, 2008, with an umbilical hernia. He had had a previous repair. He apparently was at work and had worsening of pain and was seen here. On exam, he definitely has a reducible incisional hernia around his umbilicus approximately 2-3 cm in size. The question raised to me was did this happen with this or was it previous. I, obviously, cannot tell when his hernia occurred. All I can tell you is that he definitely has a hernia now and, instead, you would have to base it more on his own history.[6]

CONCLUSIONS OF LAW

Injured workers do not lose their right to workers compensation benefits merely because they have a preexisting injury or condition. When an accident aggravates a preexisting condition, that injury is compensable under the Workers Compensation Act.[7] Consequently, the test is not whether an accident *caused* an injury or condition but, instead, whether the accident *aggravated* or *accelerated* a preexisting condition.[8]

The undersigned finds claimant had a protrusion in his abdomen following the August 2003 incident when the torque wrench struck his abdomen. Accordingly, it is more probably

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[5] *Id.*, Resp. Ex. B.

[6] *Id.*, Cl. Ex. 1.

[7] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

true than not that claimant developed his umbilical hernia at that time. And as claimant continued to work his hernia increased in size. But the evidence is also uncontradicted that both the size of claimant's protrusion and his pain increased substantially following the May 2008 tire incident. That evidence establishes claimant sustained additional injury to his abdomen. Accordingly, the undersigned finds the surgery that is now recommended is directly related to claimant's May 7, 2008, accident.

In summary, claimant injured and aggravated his abdomen in the May 7, 2008, accident that arose out of and in the course of his employment with respondent. And the greater weight of the evidence at this juncture establishes that claimant's present need for medical treatment is directly related to that accident. Consequently, the August 29, 2008, preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the August 29, 2008, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of November, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Thomas Kelly Ryan, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

[9] K.S.A. 44-534a.